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2  
3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 BRITTNEY MENEFEE, et al.,

7 Plaintiffs,

8 v.

9 TACOMA PUBLIC SCHOOL  
10 DISTRICT NO. 10, et al.,

11 Defendants.

CASE NO. C17-6037 BHS

ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS

12 This matter comes before the Court on Defendant Steven Holmes's motion to  
13 dismiss. Dkt. 8. The Court has considered the pleadings filed in support of and in  
14 opposition to the motion and the remainder of the file and hereby grants the motion for  
15 the reasons stated herein.

16 **I. PROCEDURAL HISTORY**

17 On December 12, 2017, Plaintiffs T.D.F. and Brittney Menefee filed their  
18 complaint in this action. Dkt. 1. Plaintiffs have asserted claims under 42 U.S.C. § 1983  
19 against Defendants Tacoma Public School District No. 10, Sandra Holmes, and Steven  
20 Holmes arising from an alleged sexual assault on T.D.F. by one of her kindergarten  
21 classmates. *Id.* Plaintiffs have also asserted claims against the school district under Title  
22 IX. *Id.*

1 On January 17, 2018, Steven Holmes moved to dismiss the complaint to the extent  
2 it asserted claims against him under 42 U.S.C. § 1983. Dkt. 8. On February 5, 2018,  
3 Plaintiffs responded. Dkt. 12. On February 9, 2018, Steven Holmes replied. Dkt. 13.

## 4 II. FACTUAL BACKGROUND

5 In 2013, Defendant Sandra Holmes was a kindergarten teacher in Tacoma,  
6 Washington, and Steven Holmes (unrelated to Sandra Holmes) was the school's  
7 principal. Dkt. 1 at 4. From September of 2013 until December 4, 2013, Defendant  
8 Sandra Holmes took a medical leave, during which her kindergarten class was taught by a  
9 substitute teacher, Megan Clark ("Clark"). *Id.* On December 4, 2013, a meeting was held  
10 wherein Steven Holmes and Sandra Holmes met with T.D.F.'s parents, who expressed  
11 concern that Sandra Holmes was known as being "the worst [teacher] in the school," and  
12 that "a survey of other parents" proved it. *Id.* At the meeting, T.D.F.'s mother requested a  
13 different teacher. *Id.*

14 During the transition from Clark to Sandra Holmes, Clark alerted Sandra Holmes  
15 to a danger posed by one of the male students in the classroom. *Id.* The male student had  
16 reportedly engaged in dangerous behaviors, including sexually inappropriate touching of  
17 a female student. *Id.* As a result, Clark had implemented procedures to prevent potentially  
18 dangerous and sexually inappropriate behaviors, such as structured bathroom rules that  
19 allowed only one student to use the restroom at a time in order. *Id.* After the transition,  
20 Sandra Holmes did not enforce the rules established by Megan Clark regarding bathroom  
21 use. *Id.* at 5.

1 In December of 2013, after the transition, Sandra Holmes informed the school  
2 counselor that the aforementioned male student had “a touching problem” and that he had  
3 “been touching kids in [her] class.” *Id.* at 4. She stated that the counselor needed to “get  
4 him help.” *Id.* However, Sandra Holmes did not report the behavior of the male student to  
5 law enforcement or the Child Protective Services (“CPS”) agency within Washington’s  
6 Department of Social and Health Services (“DSHS”). *Id.* at 5.

7 Within two months of the transition back to Sandra Holmes’s teaching, Steven  
8 Holmes received approximately sixty complaints regarding Sandra Holmes. *Id.* at 4.  
9 Despite these complaints, Steven Holmes did not reprimand Sandra Holmes, replace her,  
10 or provide additional oversight of her teaching until January 16, 2014. *Id.*

11 On January 16, 2014, Steven Holmes issued a “letter of direction” to Sandra  
12 Holmes for unprofessional conduct, including:

- 13 1. Releasing students to other adults not on the contact list (3  
14 instances);”
- 15 2. Having an (unknown) parent watch the class while Defendant  
16 Sandra Holmes exited her classroom to go to the staffroom;
- 17 3. Grabbing a student by the shirt and others by the arm to line up;
- 18 4. Not knowing the first and last names of her students by the sixth  
19 week;
- 20 5. Leaving a child in a timeout for 1.5 hours; and
- 21 6. Allowing kindergarten students to answer the classroom  
22 telephone.

*Id.* Sandra Holmes admitted to these violations. *Id.* Steven Holmes also gave specific  
directions to help Sandra Holmes avoid such conduct in the future. *Id.* The letter included  
a warning that failure to follow the directions would result in discipline, including the  
possibility of termination of Sandra Holmes’s employment. *Id.*

1 On an unspecified date in mid-January of 2014, the mother of one of Sandra  
2 Holmes's students emailed Sandra Holmes and informed her that a male student in the  
3 class had asked to touch her daughter's genital area that day. *Id.* at 6. The mother  
4 reminded Sandra Holmes that the same student "had inappropriately touched her  
5 daughter in the fall" and requested that her daughter be placed in a different class. *Id.*  
6 Sandra Holmes notified Steven Holmes of this complaint. Neither Sandra Holmes nor  
7 Steven Holmes informed law enforcement or CPS of this incident, even though the  
8 School District's policy no. 3421 and RCW required district employees who have  
9 "reasonable cause" to believe a child has suffered from abuse to report the incident. *Id.*

10 On January 23, 2014, Sandra Holmes left her class unsupervised notwithstanding  
11 the previous warning. *Id.* at 5. A parent volunteer at the school discovered the  
12 unsupervised classroom and monitored the classroom until Sandra Holmes returned. *Id.*  
13 When Sandra Holmes returned, she asked the parent volunteer whom she had never met  
14 to watch the class while she went to lunch. *Id.*

15 On January 31, 2014, Steven Holmes conducted a classroom observation of  
16 Sandra Holmes's class. *Id.* at 6. His observation found the classroom to be unsafe. *Id.*  
17 During the observation, a student left the group and was unnoticed while coloring on a  
18 whiteboard for approximately 20 minutes, until directed back to the group by a parent  
19 volunteer. *Id.* During an unannounced fire drill that day, Sandra Holmes left a student  
20 behind in the classroom who was eventually escorted out by someone else. *Id.*

21 On February 5, 2014, T.D.F. was found without her pants and underwear during  
22 recess. *Id.* Another staff member reported this to Sandra Holmes. *Id.* Sandra Holmes

1 responded that she “hoped this conduct would not continue because it was not the first  
2 time [T.D.F.] had been found without her clothes on.” *Id.* Sandra Holmes did not report  
3 this incident, nor had she reported any other incidents involving T.D.F., to Steven  
4 Holmes, law enforcement, or CPS. *Id.* at 6–7.

5 On February 7, 2014, T.D.F.’s mother observed after school that T.D.F.’s clothes  
6 and hair were disheveled and her pants were unbuttoned and unzipped so that her  
7 underwear was exposed. *Id.* at 7. T.D.F. revealed to her mother that the aforementioned  
8 male student in her class had “crawled under a table during class, removed her pants, and  
9 orally copulated her private parts.” *Id.* T.D.F.’s mother contacted Steven Holmes by  
10 phone and Steven Holmes then reported the incident to law enforcement. *Id.* The act of  
11 sexual abuse on T.D.F. had been unnoticed by Sandra Holmes although it occurred in her  
12 classroom. *Id.*

13 A subsequent investigation by law enforcement “established an institutional loss  
14 of control in Defendant Sandra Holmes’[s] classroom that threatened the health and well-  
15 being of all students in class, and that sexual abuse had been occurring for some time.”  
16 *Id.*

### 17 **III. DISCUSSION**

18 Steven Holmes has moved to dismiss Plaintiffs’ claims against him pursuant to  
19 Rule 12(b)(6). Dkt. 8. He argues that Plaintiffs have failed to state a claim against him  
20 upon which relief can be granted because he is entitled to qualified immunity under the  
21 facts as alleged in Plaintiffs’ complaint. *Id.*

1   **A.     Standard**

2           Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil  
3   Procedure may be based on either the lack of a cognizable legal theory or the absence of  
4   sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901  
5   F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the  
6   complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301  
7   (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed  
8   factual allegations but must provide the grounds for entitlement to relief and not merely a  
9   “formulaic recitation” of the elements of a cause of action. *Bell Atlantic Corp. v.*  
10   *Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege “enough facts to state a  
11   claim to relief that is plausible on its face.” *Id.* at 1974.

12           Additionally, “[g]overnment officials performing discretionary functions enjoy  
13   qualified immunity from civil damages so long as their conduct does not violate ‘clearly  
14   established statutory or constitutional rights of which a reasonable person would have  
15   known.’” *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) (quoting  
16   *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Under qualified immunity, a public  
17   official is protected from suit when he or she “makes a decision that, even if  
18   constitutionally deficient, reasonably misapprehends the law governing the  
19   circumstances.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). It protects “all but the  
20   plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S.  
21   335, 341 (1986). “Qualified immunity is an immunity from suit rather than a mere  
22   defense to liability.” *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (quotation marks

omitted). Accordingly, to adequately plead a claim against such government officials, Plaintiffs bear the burden of pleading facts that demonstrate that a violation of a right that was clearly established at the time of the alleged misconduct. *See id.*

**B. 42 U.S.C. § 1983 Claims Against Steven Holmes**

Steven Holmes advances two arguments to suggest that he is entitled to qualified immunity. First, he argues that Plaintiffs have failed to specify a particular federal right that was violated by Steven Holmes’s alleged conduct. Second, he argues that Plaintiffs have failed to allege facts demonstrating that his failure to prevent the male kindergartner’s abuse of T.D.F. violated a clearly established right of Plaintiffs.

**1. Implicated Federal Rights**

Steven Holmes’s first argument asserts that “Plaintiff never states what constitutional right Mr. Holmes purportedly violated” beyond “mere conclusions that he violated Plaintiff’s Ninth and Fourteenth Amendment rights by allegedly creating a danger that Plaintiff would be sexually abused and by failing to protect Plaintiff from such purported abuse.” Dkt. 8. Steven Holmes continues to note that “[g]eneralized allegations of constitutional violations, however, are insufficient to rebut an official’s assertion of a qualified immunity defense.” *Id.* (quoting *Maraziti v. First Interstate Bank of California*, 953 F.2d 520, 524 (9th Cir. 1992) (citation omitted)).

Steven Holmes is correct that Plaintiffs have failed to state any viable claim based on alleged violations of the Ninth Amendment. “[T]he ninth amendment has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim.” *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986).

1           Nonetheless, the due process rights secured by the Fourteenth Amendment include  
2   “the right to be free from state-imposed violations of bodily integrity” and it is well-  
3   established that sexual abuse violates that right. *Plumeau v. Sch. Dist. No. 40 Cty. of*  
4   *Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). The question of whether a school official’s  
5   failure to prevent student-on-student sexual abuse constitutes a violation of a clearly  
6   established federal right actionable under 42 U.S.C. § 1983 warrants substantive  
7   discussion and is addressed below in this order. However, for the purposes of addressing  
8   Steven Holmes’s first argument, it is sufficient for the Court to note that the complaint  
9   sets out a specific allegation of sexual abuse which, if “state-imposed,” would constitute  
10   a grave violation of T.D.F.’s right to bodily integrity under the Fourteenth Amendment.  
11   The right to bodily integrity is plainly implicated by Plaintiffs’ factual allegations of  
12   sexual abuse and Plaintiffs specifically claim that such abuse violated T.D.F.’s  
13   Fourteenth Amendment due process rights.

## 14           **2.     Liability for Third-Party Acts**

15           Steven Holmes also moves to dismiss the claims against him on the basis that  
16   Plaintiffs have failed to allege facts demonstrating that he can be liable under 42 U.S.C. §  
17   1983 for sexual abuse perpetrated by a third party. Specifically, Steven Holmes argues  
18   that Plaintiffs fail to allege facts that overcome “[t]he general rule announced in  
19   *DeShaney* that members of the public have no constitutional right to sue state actors who  
20   fail to protect them from harm inflicted by third parties.” *Johnson v. City of Seattle*, 474  
21   F.3d 634, 639 (9th Cir. 2007) (citing *DeShaney v. Winnebago County Dep’t of Soc. Serv.*,  
22   489 U.S. 189, 195 (1989) (“[N]othing in the language of the Due Process Clause itself

1 requires the State to protect the life, liberty, and property of its citizens against invasion  
2 by private actors.”)).

3 Under the *DeShaney* rule, liability for 42 U.S.C. § 1983 due process violations is  
4 precluded when the harm is inflicted by a private actor unless a plaintiff can establish that  
5 the abuse grew out of a “state created danger” or the government defendant had a  
6 “special relationship” with the plaintiff. *See Johnson*, 474 F.3d at 639. Plaintiffs’  
7 complaint makes clear that T.D.F.’s cause of action against Steven Holmes is predicated  
8 on his “actions in failing to promulgate, issue, and enforce appropriate procedures and  
9 policies concerning the protection of its students including T.D.F. who suffered sexual  
10 abuse and exploitation” at the hands of a private actor. Dkt. 1 at 8. Accordingly, to state a  
11 viable due process claim against Steven Holmes under 42 U.S.C. § 1983, Plaintiffs must  
12 allege facts showing either that Steven Holmes had a “special relationship” with T.D.F.  
13 or Steven Holmes’s actions resulted in a “state created danger” out of which T.D.F.’s  
14 abuse grew.

15 Plaintiffs have conceded that the special-relationship exception does not apply to  
16 Plaintiffs’ claims. Dkt. 12 at 14 n.48. Indeed, “[t]he special-relationship exception does  
17 not apply when a state fails to protect a person who is not in custody,” *Patel v. Kent Sch.*  
18 *Dist.*, 648 F.3d 965, 972 (9th Cir. 2011), and the Ninth Circuit has concluded that  
19 “[c]ompulsory school attendance and *in loco parentis* status do not create ‘custody’ under  
20 the strict standard of *DeShaney*.” *Id.* at 973. Accordingly, the viability of Plaintiffs’ 42  
21 U.S.C. § 1983 claims against Steven Holmes turns on whether any of his actions  
22 constitute a basis for imposing liability under the “danger-creation” exception.

1       The Ninth Circuit’s “‘state-created danger’ cases . . . contemplate § 1983 liability  
2 for the state actor who, though not inflicting plaintiff’s injury himself, has placed plaintiff  
3 in the harmful path of a third party not liable under § 1983.” *Kennedy v. City of*  
4 *Ridgefield*, 439 F.3d 1055, 1082 (9th Cir. 2006). This exception applies only where (1)  
5 there is “affirmative conduct on the part of the [defendant] in placing the plaintiff in  
6 danger” and (2) the defendant “acts with ‘deliberate indifference’ to a ‘known or obvious  
7 danger.’” *Patel*, 648 F.3d at 974 (quoting *Munger v. City of Glasgow Police Dep’t*, 227  
8 F.3d 1082, 1086 (9th Cir. 2000); *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996)).

9               **a.       Affirmative Acts Under the Danger-Creation Exception**

10       The touchstone for determining if an official has taken an affirmative act under the  
11 danger-creation exception is “whether the officers left the person in a situation that was  
12 more dangerous than the one in which they found him.” *Munger*, 227 F.3d at 1086. In  
13 *Johnson*, the Ninth Circuit examined cases where it had previously recognized  
14 affirmative acts that implicated the danger-creation exception. 474 F.3d 634. Examining  
15 those cases, the Ninth Circuit noted that it had only found affirmative state actions when  
16 (1) there was “involuntary exposure to harm, as a result of a state actor’s command,” (2)  
17 “the state actor exposed the plaintiff to a danger which she otherwise would not have  
18 faced,” or (3) state actors “confine[d] the . . . Plaintiffs to a place where they would be  
19 exposed to a risk of harm by private persons.” *Id.* at 640–41. For instance, in *Grubbs*, a  
20 medium-security prison assigned a nurse to work unknowingly alongside a dangerous sex  
21 offender who had failed all the institution’s treatment programs, despite previous  
22 assurances that she would not be required to work alone with violent sex offenders. *See*

1 | *Grubbs*, 974 F.2d 119. In *Penilla*, the danger-creation exception applied when police  
2 | locked a seriously ill person in his house and cancelled a neighbor’s 911 request for  
3 | emergency services. *Penilla v. City of Huntington Park*, 115 F.3d 707, 710–11 (9th Cir.  
4 | 1997). In *Munger*, police expelled a belligerent and intoxicated bar patron, wearing only  
5 | a T-shirt and jeans, into subfreezing temperatures where he died of hypothermia only two  
6 | blocks away. *Munger*, 227 F.3d at 1084–85. In *Kennedy*, police assured a mother who  
7 | had reported the molestation of her daughter that they would give her notice prior to  
8 | contacting the accused neighbor. *Kennedy*, 439 F.3d at 1057–58. The police failed to  
9 | provide notice to the mother before contacting the neighbor and, early the next morning,  
10 | she was shot in her bed while sleeping. *Id.* at 1058. In each of these cases, the  
11 | government actively exposed the victim to a risk of harm that was involuntary on the part  
12 | of the victim. Accordingly, in each of these cases, it could be said that the government  
13 | “affirmatively created an actual, particularized danger [the plaintiffs] would not  
14 | otherwise have faced.” *Kennedy*, 439 F.3d at 1063.

15 |       However, in *Johnson*, the Ninth Circuit concluded that the defendant police  
16 | officers had not engaged in any affirmative conduct that satisfied the first prong of the  
17 | danger-creation exception. In that case, the plaintiffs had been assaulted, injured, and in  
18 | one case killed by a crowd during a Mardi Gras celebration. *Johnson*, 474 F.3d at 637.  
19 | The plaintiffs alleged that police had been deliberately indifferent to their safety by  
20 | abandoning an aggressive crowd-control operational plan in favor of a more passive one.  
21 | *Id.* at 639. Ultimately, the Ninth Circuit concluded that the danger-creation exception did  
22 | not apply because the plaintiffs “failed to offer evidence that the Defendants engaged in

1 affirmative conduct that enhanced the dangers the . . . Plaintiffs exposed themselves to by  
2 participating in the Mardi Gras celebration.” *Id.* at 641.

3       Until December 4, 2013, T.D.F.’s class was taught by Megan Clark.  
4 Notwithstanding requests to Steven Holmes that Sandra Holmes not be placed in charge  
5 of T.D.F.’s class, Sandra Holmes resumed her teaching duties on December 4, 2013.  
6 Later, in January of 2014, Steven Holmes was made aware of multiple instances of sexual  
7 abuse that had occurred in Sandra Holmes’s kindergarten class, including when a male  
8 student had inappropriately touched a female student and had again subsequently asked to  
9 touch the female student’s genital area. Dkt. 1 at 6. Steven Holmes also had prior  
10 knowledge that Sandra Holmes’s classroom presented a dangerous environment of  
11 inattention. *Id.* at 4–7. Steven Holmes had received approximately sixty complaints  
12 regarding Sandra Holmes and had himself observed that Sandra Holmes’s classroom was  
13 an unsafe environment. Despite this knowledge, Steven Holmes failed to report the  
14 sexual abuse of which he learned in January of 2014 as required under the school  
15 district’s policy no. 3421. *Id.* at 7. It was not until February 7, 2014 that Steven Holmes  
16 reported any instances of sexual abuse occurring in Sandra Holmes’s classroom upon  
17 learning of the sexual abuse against T.D.F. *Id.*

18       Ultimately, these allegations amount to assertions that Steven Holmes failed to  
19 implement reasonable corrective actions. Plaintiffs do not allege that Steven Holmes took  
20 an affirmative act in assigning Sandra Holmes to T.D.F.’s class. Rather, the complaint  
21 states that Sandra Holmes returned from medical leave to a classroom that was hers  
22 already. Furthermore, the complaint does not allege that Steven Holmes participated in

1 any acts that contributed to dangers in the classroom, but only that he failed to abate  
2 dangers that he knew to exist. Under the Ninth Circuit’s construction of the danger-  
3 creation exception, an affirmative act cannot be based “on omissions of the state,  
4 regardless of how egregious—the state must take some action that affirmatively places  
5 the plaintiff in a position of danger, that is, where the state action creates or exposes an  
6 individual to a danger which he or she would not have otherwise faced.” *I.V. v.*  
7 *Wenatchee Sch. Dist. No. 246*, 2:17-CV-0118-TOR, 2017 WL 4683424, at \*5 (E.D.  
8 Wash. Oct. 18, 2017) (quotation marks omitted). Accordingly, the Court must find that  
9 Plaintiffs have failed to allege facts that satisfy the requirements of the danger-creation  
10 exception to the limits on liability under § 1983 due process claims for private third-party  
11 acts.

12       The Court notes that some extra-circuit authority suggests that a failure to report  
13 sexual abuse in accordance with applicable guidelines can, on its own, constitute an  
14 unconstitutional affirmative action if it proximately causes a constitutional deprivation.  
15 *See e.g., Doe v. New York City Dep’t of Soc. Servs.*, 649 F.2d 134, 146 (2d Cir. 1981)  
16 (“[T]he failure to report *was itself a proximate cause of [a] continuing injury and could*  
17 *be the basis for liability* if the agency’s failure was the result of its being deliberately  
18 unconcerned about whether it complied with that duty, since reporting would have led to  
19 an investigation by the Department’s confidential investigations unit which might well  
20 have discovered the abuse and put an end to it . . . .”) (emphasis added). The Court has  
21 previously relied on such authority in determining whether adequate evidence supported  
22 a theory of deliberate indifference. *W.H. v. Olympia Sch. Dist.*, C16-5273 BHS, 2017 WL

1 3581632, at \*7 (W.D. Wash. Aug. 18, 2017), *reconsideration denied*, C16-5273 BHS,  
2 2017 WL 4408034 (W.D. Wash. Oct. 4, 2017). However, such authority is not binding in  
3 the Ninth Circuit, and is insufficient on its own to clearly establish that the failure to  
4 comply with mandatory reporting requirements constitutes an affirmative act under the  
5 danger-creation exception. Even if a court were inclined to find that the law should allow  
6 claims predicated on egregious omissions such as failures to comply with mandatory  
7 reporting requirements under a new formulation of the danger-creation exception, such a  
8 ruling would be of no avail in Plaintiffs' claims against Steven Holmes. Steven Holmes  
9 would still be entitled to qualified immunity on the basis that it was not clearly  
10 established at the time of T.D.F.'s abuse that the omissions contributing to his failure to  
11 protect T.D.F from a third-party private actor constituted due process violations.

12 **b. Deliberate Indifference**

13 Even though the Court has found that Plaintiffs have presently failed to allege an  
14 affirmative act within the clearly established contours of the danger-creation exception, it  
15 is important for the purposes of amended pleadings that the Court still address whether  
16 Plaintiffs have alleged facts supporting a theory that any presently unpled affirmative acts  
17 by Steven Holmes were carried out with deliberate indifference to T.D.F.'s safety. While  
18 the Court has not clearly established that a failure to report in compliance with mandatory  
19 reporting requirements is an "affirmative act" within the meaning of the danger-creation  
20 exception, the Court concludes that a failure to comply with reporting requirements does  
21 evince a plausible theory of deliberate indifference towards children's right to bodily  
22 integrity. *New York City Dep't of Soc. Servs.*, 649 F.2d at 146 (stating that failure to

1 comply with reporting duties is “evidence of an overall posture of deliberate indifference  
2 toward [a child]’s welfare.”). Moreover, Plaintiffs have alleged additional facts  
3 indicating that Steven Holmes acted with an attitude of deliberate indifference towards a  
4 known risk to the safety of the children in Sandra Holmes’s class. Despite approximately  
5 sixty complaints about Sandra Holmes’s classroom, a “letter of direction” that he drafted,  
6 and Steven Holmes’s own alleged observations of Sandra Holmes’s inadequate  
7 supervision in her classroom that constituted failures to comply the “letter of direction,”  
8 Steven Holmes allowed Sandra Holmes to continue teaching without taking any  
9 discipline or actions that would abate the immediate risk to the children’s safety.

10 Notably, in light of Steven Holmes’s “letter of direction” and subsequent  
11 classroom observation, whether Steven Holmes’s course of action to address the safety  
12 concerns in Sandra Holmes’s classroom constitutes deliberate indifference is an open  
13 question. Generally, an official acts with deliberate indifference if he knows of “a  
14 substantial risk of serious harm and disregards that risk *by failing to take reasonable*  
15 *measures to abate it.*” *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016),  
16 *cert. denied sub nom. Los Angeles Cty., Cal. v. Castro*, 137 S. Ct. 831 (2017) (quotation  
17 marks omitted) (emphasis in original). Steven Holmes is correct that some facts alleged  
18 in the complaint could be construed to suggest that he did not act with deliberate  
19 indifference to the children’s safety. See Dkt. 8 at 9. It may be that the timeframe of  
20 Steven Holmes’s “letter of direction” on January 16, 2014, his classroom observation of  
21 Sandra Holmes’s class on January 31, 2014, and the abuse of T.D.F. on February 5, 2014  
22 ultimately establish that Steven Holmes was actively seeking to abate the unsafe

1 conditions posed by Sandra Holmes's inattention in a reasonable manner. However, the  
2 Court is required to construe the factual allegations in the complaint in the light most  
3 favorable to Plaintiffs when evaluating a motion to dismiss. Considering the gravity of  
4 the alleged misconduct occurring in Sandra Holmes's classroom and Steven Holmes's  
5 alleged knowledge of the children's risk of harm, Plaintiffs have stated a plausible claim  
6 that Steven Holmes was aware of an excessive risk to T.D.F. and knew that the remedial  
7 measures he was taking were unreasonably inadequate to abate the immediate danger to  
8 the children's safety.

### 9 **C. Amending the Complaint**

10 Plaintiffs have requested that the Court grant them leave to amend any deficiencies  
11 in their pleading of 42 U.S.C. § 1983 due process claims against Steven Holmes. Leave  
12 to amend an initial pleading may be allowed by leave of the Court and "shall freely be  
13 given when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962); Fed. R. Civ.  
14 P. 15(a). Granting leave to amend rests in the discretion of the trial court. *Internat'l Ass'n*  
15 *of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir.  
16 1985). In determining whether amendment is appropriate, the Court considers five  
17 potential factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4)  
18 futility of amendment, and (5) whether there has been previous amendment. *United States*  
19 *v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). The Court's decision is guided  
20 by the established practice of permitting amendments with "extreme liberality" in order  
21 to further the policy of reaching merit-based decisions. *DCD Programs Ltd. v. Leighton*,  
22 833 F.2d 183, 186 (9th Cir. 1987). In light of this policy, the nonmoving party generally

1 bears the burden of showing why leave to amend should be denied. *Genentech, Inc. v.*  
2 *Abbott Labs.*, 127 F.R.D. 529, 530–31 (N.D. Cal. 1989).

3 Although Plaintiffs have presently failed to allege that Steven Holmes took any  
4 affirmative acts that placed T.D.F. in a position of enhanced danger, it is far from clear  
5 that such facts could not be supplied if leave to amend were granted. Steven Holmes has  
6 not argued that any other factors other than futility weigh against amendment, and they  
7 plainly do not. Therefore, the Court grants Plaintiffs leave to file an amended complaint  
8 to cure the inadequacy of their 42 U.S.C. § 1983 due process claims against Steven  
9 Holmes.

10 Also, in their response, Plaintiffs argue that 42 U.S.C. § 1983 provides a cause of  
11 action for violations of rights secured under Title IX. Dkt. 12 at 19–22. *See Oona R.-S.-*  
12 *by Kate S. v. McCaffrey*, 143 F.3d 473, 476–78 (9th Cir. 1998). However, the complaint  
13 does not assert claims against Steven Holmes under 42 U.S.C. § 1983 for alleged  
14 violations of T.D.F.’s rights secured by Title IX. Instead, Plaintiffs’ 42 U.S.C. § 1983  
15 claims only reference rights secured by the Ninth and Fourteenth Amendments. Dkt. 1 at  
16 8. Plaintiffs separately bring claims under Title IX’s implied cause of action, but those  
17 claims are asserted exclusively against the school district, not Steven Holmes. Dkt. 1 at 9.  
18 If Plaintiffs seek to bring claims under 42 U.S.C. § 1983 for violations of rights secured  
19 by Title IX, or if they wish to bring claims against the individually named defendants  
20 under Title IX’s implied cause of action, they may move for leave to amend their  
21 complaint pursuant to Rule 15 and the Local Civil Rules. Fed. R. Civ. P. 15(a)(2); W.D.  
22 Wash. Local Rules LCR 15. However, because the claims against Sandra Holmes and the

1 school district remain and Plaintiffs are not faced with a complete dismissal of their  
2 lawsuit, the Court does not need to consider the propriety of amending the complaint in  
3 regards to claims against Sandra Holmes and the school district absent a separate motion  
4 employing the Court's local procedures for seeking leave to amend. W.D. Wash. Local  
5 Rules LCR 15. Accordingly, while the Court will presently grant Plaintiffs leave to  
6 amend the complaint for the limited purpose of alleging affirmative acts by Steven  
7 Holmes that enhanced the danger of abuse against T.D.F., it may be expedient for  
8 Plaintiffs to instead submit a separate motion for leave to amend that sets out a  
9 comprehensive overview of their proposed amendments.

#### 10 **IV. ORDER**

11 Therefore, it is hereby **ORDERED** that Steven Holmes's motion to dismiss (Dkt.  
12 8) is **GRANTED** and Plaintiffs' 42 U.S.C. § 1983 claims against Steven Holmes are  
13 **DISMISSED**. Plaintiffs are granted leave to file an amended complaint for the purpose  
14 of curing their presently-asserted 42 U.S.C. § 1983 due process claims against Steven  
15 Holmes. Any amended complaint filed pursuant to the leave granted by this order must  
16 be submitted no later than April 20, 2018. Otherwise, Plaintiffs may move for leave to  
17 amend in a separate motion.

18 Dated this 29th day of March, 2018.

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BENJAMIN H. SETTLE  
United States District Judge